LEE MUN KEONG

v.

PRECISE AVENUE (M) SDN BHD & ANOR

HIGH COURT MALAYA, SHAH ALAM
HASHIM HAMZAH JC
[CIVIL SUIT NO: 22NCVC-305-2011]
3 APRIL 2014

LEGAL PROFESSION: *Advocates and solicitors - Remuneration - Counsel's fees - Solicitor advised client to make further claims against another party on condition solicitor be paid 30% of success fee as legal fees - Champerty agreement - Whether agreement champertous in nature - Whether agreement void ab initio and unenforceable - Legal Profession Act 1976, s. 112(b) - Contracts Act 1950, ss. 24, 66*

CONTRACT: *Agreement - Solicitor and client - Remuneration - Counsel's fees - Solicitor advised client to make further claims against another party on condition solicitor be paid 30% of success fee as legal fees - Champerty agreement - Whether agreement champertous in nature - Whether agreement void ab initio and unenforceable - Legal Profession Act 1976, s. 112(b) - Contracts Act 1950, ss. 24, 66*

The first plaintiff had a dispute with its joint venture partner, Unisensa Sdn Bhd ('Unisensa'), as a result of which legal proceedings were instituted. The second defendant was appointed to represent the first plaintiff as its solicitor. The matter was resolved in 2008, where Unisensa was held accountable and accordingly some payments were made by Unisensa to the first plaintiff. Notwithstanding the receipt of payments from Unisensa, the second defendant advised the first plaintiff that it could still claim against Unisensa an additional sum of RM8 million. The second defendant advised SP1 that the additional sum could be further claimed on condition that the second defendant be paid 30% of the success fee as legal fees in due course. The second defendant prepared an agreement dated 30 November 2010 ('the agreement') which was signed by SP1 on behalf of the first plaintiff as well as the guarantee and indemnity agreement ('guarantee and indemnity agreement'), also signed by SP1 on behalf of the second plaintiff, which was purported to guarantee the performance of the agreement by the first plaintiff. The second defendant then collected from the first plaintiff the amount of RM700,000 as part of the sum stipulated in the agreement.

However, the second defendant never filed any suit on behalf of the first plaintiff to pursue the RM8 million claim against Unisensa. Subsequently, the second defendant assigned all rights under the agreement and the guarantee and indemnity agreement to the first defendant, and commenced an action against the plaintiffs for RM1,700,000 (*ie*, 30% of RM8 million minus RM700,000) by way of an originating summons, which was struck out. The plaintiffs counterclaimed against the defendants, seeking a declaration that the agreement and the guarantee and indemnity agreement were void and unenforceable. Consequently, the plaintiffs also sought the return of RM700,000. The issues that arose were (i) whether the agreement was a "champerty" agreement; and (ii) whether such a contract was valid and legally enforceable.

Held (allowing plaintiff's counterclaim with costs):

(1) The facts adduced showed that the second defendant had acted as the first plaintiff's solicitor in settling disputes between the first plaintiff and Unisensa. There was a further arrangement between the first plaintiff and the second defendant after the dispute had been resolved whereby the second defendant advised the first plaintiff that the first plaintiff could still claim against Unisensa an additional sum of RM8 million on a condition that the second defendant was to be paid 30% of the success fee as legal fees in due course. This arrangement was the fact leading to the agreement and the guarantee and indemnity agreement being reduced into writing. The contention that there must be express stipulation in the agreement to show that such an agreement was champertous in nature was held to be unnecessary as long as there was evidence that the fees to be collected by the solicitor was to be paid only upon a successful legal suit (*Lau Liat Meng v. Disciplinary Committee*, refd). The agreement entered into by the first plaintiff and the second defendant herein was found to be champertous in nature. (paras 15-19)

(2) It is trite law that any contract in which the consideration is forbidden by law is illegal and void *ab initio* (s. 24 of the Contracts Act 1950). In this case, the consideration was forbidden under s. 112(b) of the Legal Profession Act 1976. The agreement was thus void *ab initio* and unenforceable by law. Consequently, the guarantee and indemnity agreement which was contingent to the agreement was also void *ab initio* and unenforceable by law. (para 21)

(3) When an agreement was either discovered to be void or became void, the party who received any advantage must restore or compensate to other party from whom he had received such advantage (s. 66 of Contracts Act 1950). As such, the plaintiff's counterclaim was allowed. (paras 22 & 23)

Case(s) referred to:

Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v. M Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

In re A Solicitor Ex parte The Law Society [1912] 1 KB 302 ***(refd)***

Lau Liat Meng v. Disciplinary Committee [1967] 1 LNS 76 PC ***(refd)***

Mastika Jaya Timber Sdn Bhd v. Shankar Ram Pohumall (No 2) [2010] 10 CLJ 312 HC ***(refd)***

Quill Construction Sdn Bhd v. Tan Hor Teng & Anor [2006] 2 CLJ 358 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 24, 66

Legal Profession Act 1976, s. 112(b)

For the plaintiff - Lim Choon Khim (Chow Siew Wai with him); M/s Chooi, Saw & Lim

For the defendants - Lee Han Meng; M/s HM Lee

Reported by Suhainah Wahiduddin

JUDGMENT

Hashim Hamzah JC:

Introduction

[1] This is a counterclaim made by the Precise Avenue (M) Sdn Bhd (hereinafter referred to as the "first plaintiff") and Piagamas Maju Sdn Bhd (hereinafter referred to as the "second plaintiff") against Lee Mun Keong (hereinafter referred to as the "first defendant") and Lee Lim Huat (hereinafter referred to as the "second defendant").

The Plaintiff's Counterclaims

[2] In essence, the plaintiffs in the present case sought for a declaration that the agreement dated 30 November 2010 entered into between the first plaintiff and the second defendant (hereinafter referred to as the "agreement") and the guarantee and

indemnity agreement dated also on 30 November 2010 entered into between the second defendant and the second plaintiff (hereinafter referred to as the "guarantee and indemnity agreement") are void and unenforceable. Both of which shall be explained later in this judgment. Consequently, the plaintiffs are also seeking for the return of RM700,000 in which the second defendant had collected beforehand from the first plaintiff by virtue of the agreement.

Brief Facts

[3] Now, the brief facts of this case based on the evidence produced before me are as follows.

[4] In 2000, the first plaintiff had a dispute with its joint venture partner, Unisensa Sdn Bhd (hereinafter referred to as "Unisensa"), as a result of which legal proceedings were instituted. The second defendant was appointed to represent the first plaintiff as its solicitor. The matter was then resolved somewhere in 2008. Messrs Ernst & Young was appointed as the independent party to prepare a report on the amount which Unisensa was to be held accountable to the first plaintiff. The report was duly prepared and accordingly some payments were made by Unisensa to the first plaintiff.

[5] Notwithstanding the receipt of payments from Unisensa, the second defendant advised the director of the first plaintiff, namely one Zainol @ Zainol Abidin bin Mohamad (PW1), that the first plaintiff could still claim against Unisensa an additional sum of RM8 million. The second defendant advised SP1 that the additional sum can be further claimed on a condition that the second defendant is to be paid 30% of the success fee in as legal fees due course.

[6] Based on the aforesaid arrangement, somewhere in 2010, the second defendant prepared the agreement signed by SP1 on behalf of the first plaintiff. At the same time, the second defendant also prepared the guarantee and indemnity agreement which was also signed by SP1 on behalf of the second plaintiff, which was purported to guarantee the performance of the agreement by the first plaintiff.

[7] The second defendant then collected from the first plaintiff the amount of RM700,000 as part of the sum stipulated in the agreement. The receipt of such sum was also agreed by the second defendant.

[8] The second defendant never filed any suit on behalf of the first plaintiff to pursue the RM8 million claim against Unisensa. The second defendant never and failed to produce any evidence to prove any work done for the first plaintiff in furtherance of the agreement even for the RM700,000 which was already paid in advance.

[9] Later in 2011, the second defendant assigned all rights under the agreement and the guarantee and indemnity agreement to the first defendant, and used the latter as his conduit to commence the original action (herein) against the plaintiffs for RM1,700,000 (ie, 30% of RM8 million minus RM700,000). The defendants later withdrew the original action and had the same claim re-filed in the name of the second defendant by way of an originating summons before this court. On 9 October 2013, the originating summons was struck out by this court. The defendants did not file any appeal to the said decision.

Issues

[10] In the present case, I find that the main issue that must be decided by this court is whether the agreement is a "champerty agreement" and whether such a contract is valid and legally enforceable.

What Is A "Champerty Agreement"?

[11] The definition of "champerty" has been defined by James Foong J (as His Lordship then was) in the case of *Quill Construction Sdn Bhd v. Tan Hor Teng & Anor* [2006] 2 CLJ 358, HC, where it was held at p. 371 of the report, in quoting *Chitty on Contract*, as follows:

> ... 'champerty' has been defined as "an aggravated form of maintenance and occurs when the *person maintaining another stipulates for a share of the proceeds of the action or suit or other contentious proceedings where property is in dispute*" – Chitty on Contract, paras. 16-050 & 054, vol. 1, 29th edn.
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> (emphasis added)

[12] It can also be seen in the case of *In Re A Solicitor Ex Parte The Law Society* [1912] 1 KB 302 where it was held by Darling J as follows:

A But there was something more. The terms on which the respondent conducted the business were such that they amounted to champerty in law. Champerty, as the word implies, was originally common in times when there was little property of any value except land. Most early litigation was about land, and when the bargain was one which resulted in the partition of a field, what B was recovered was champerty between the solicitor and the person who claimed it. One got so much and the other so much, and that was forbidden, because it led to speculative litigation, and the harassing of persons who ought to feel secure in their rights, for the benefit of lawyers and other speculative parties. The facts of C this case bring it absolutely within the definition of champerty given in *In re Attorneys and Solicitors Act 1870 (2)*, by Sir George Jessel MR in his judgment. After dealing with several other points he continued: "I may, however, say, for the guidance of the parties, that the agreement is, in my opinion, pure champerty, as it gives to the solicitor, in the event of success, what is equivalent D to a tenth part of the property to be recovered".

Now the respondent had a distinct interest in the amount which he would recover. His commission for bringing an action was to be governed, the percentage being fixed, by the amount E recovered. It is perfectly plain, upon the uncontradicted facts which were laid before the Committee of Law Society that he tried to get the costs out of defendants in addition to the commission which he would receive from this debt-collecting agency, which was practically carried on in his own office, and with his own money. He would receive something from the plaintiffs, and what F he would get from the defendants as well. That was champerty.

[13] Provisions against a champerty agreement has been provided for in the Legal Profession Act 1976 (Act 166) (hereinafter referred to as "Act 166") in which s. 112 of Act 166 provides as G follows:

112. No advocate and solicitor to purchase interest of client

(1) Except as expressly provided in any written law, or by rules made under this Act, no advocate and solicitor shall:

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(a) purchase or agree to purchase either directly or indirectly an interest or any part of the interest which is the subject matter of his client or that of the other party in the same suit, action or other contentious proceeding brought or to be brought or maintained; or

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> (b) enter into any agreement by which he is retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success in such suit, action or proceeding.
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> (emphasis added)

[14] In understanding this issue better, I find it helpful to refer to a passage in the case of *Mastika Jaya Timber Sdn Bhd v. Shankar Ram Pohumall (No 2)* [2010] 10 CLJ 312, HC, and I quoted with great length as follows:

> Under s. 112 of the Legal Profession Act, 1976 which is applicable in West Malaysia, no advocate shall enter into any agreement which stipulates for or contemplates payment only in the event of success in such suit, action or proceeding. There is no similar provision in the Sarawak Advocate Ordinance. However, the common law definition of champerty includes such agreements. *In Re Attorney And Solicitor Act 1870* [1875] Ch 573 (cited in *Mokhtar Ngah & Co lwn. Yee Seng Plantations Sdn Bhd* [2009] 10 CLJ 348), Jessel MR said that a statutory provision that invalidated any agreement which stipulates for or contemplates payment only in the event of success in such suit, action or proceeding is meant to provide against champerty (see also *Aratra Potato Co Ltd v. Taylor Joynson Garrett (a firm)* [1995] 4 All ER 695 and *Wallersteiner v. Moir (No 2)* [1975] QB 373 that were cited by counsel for defendant). Maintenance and champerty are not actionable torts in England since 1997. However they can still be applied to declare an agreement void on the ground of public policy (see the judgment of James Foong FCJ in *Quill Construction Sdn Bhd v. Tan Hor Teng & Anor* [2006] 2 CLJ 358). As a champertous agreement, the alleged oral agreement is illegal and against public policy. Therefore, the plaintiff in this case cannot maintain this action.
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> (emphasis added)

[15] In the present case, these facts had been adduced as evidence in court. Firstly, the second defendant had acted as the first plaintiff's solicitor in settling disputes between the first plaintiff and its business partner, Unisensa. The dispute had been resolved somewhere in 2008.

[16] PW1 was also consistent in maintaining during examination-in-chief and during cross-examination that there was a further arrangement between the first plaintiff and the second defendant after the dispute had been resolved whereby the second defendant

advised the first plaintiff that the first plaintiff could still claim against Unisensa an additional sum of RM8 million on a condition that the second defendant is to be paid 30% of the success fee as legal fees in due course.

[17] This arrangement was the fact leading to the agreement and the guarantee and indemnity agreement being reduced into writing. Of course, factual matrix forming the background to a particular transaction can be relied on by the court in interpreting a private contract as decided by the Federal Court in the case of *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v. M Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597.

[18] The contention that there must be express stipulation in the agreement to show that such an agreement is champertous in nature was held to be unnecessary as long as there is evidence that the fees to be collected by the solicitor is to be paid only upon a successful legal suit as decided by the Privy Council in the case of *Lau Liat Meng v. Disciplinary Committee* [1967] 1 LNS 76; [1967] 1 LNS 76.

[19] Based on all of the above, I am satisfied that the agreement entered into by both the first plaintiff and the second defendant is champertous in nature.

What Is The Status Of A "Champerty Agreement"?

[20] Section 24 of the Contracts Act (Revised 1974) (Act 136) (hereinafter referred to as "Act 136") provides as follows:

> **The consideration or object of an agreement is lawful, unless:**
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> (a) **it is forbidden by a law;**
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> (b) it is of such a nature that, if permitted, it would defeat any law;
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> (c) it is fraudulent;
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> (d) it involves or implies injury to the person or property of another; or
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> (e) the court regards it as immoral, or opposed to public policy.
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> In each of the above cases, the consideration or object of an agreement is said to be unlawful. **Every agreement of which the object or consideration is unlawful is void.**
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> (emphasis added)

[21] This provision is very clear. It is also trite law that any contract in which the consideration is forbidden by law is illegal and void *ab initio*. In this case, the consideration is forbidden under s. 112(b) of Act 166. As such, I find that the agreement is void *ab initio* and unenforceable by law. Consequently, the guarantee and indemnity agreement which was contingent to the agreement is also void *ab initio* and unenforceable by law.

What Is The Effect Of A Void Contract?

[22] It is also trite law that when an agreement is either discovered to be void or becomes void, the party who received any advantage must restore or compensate to other party from whom he had received such advantage. This can be seen under s. 66 of Act 136 which provides that:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Conclusion

[23] As such, the plaintiff's counterclaim is therefore allowed with cost. The defendants is to pay costs of RM15,000 to the plaintiff.